IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) Reportable: No
(2) Of interest to other judges: No
(3) Revised: Yes

Date: 19 September 2022

SIGNATURE: .....

CASE NUMBER: 62486/2018

In the matter between:

THE FEDERATION OF SOUTH AFRICAN FLY FISHERS APPLICANT

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS RESPONDENT

Coram: A Vorster AJ

Heard: 7 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto https://sajustice.caselines.com, and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 19 September 2022.

ORDER

The application for leave to appeal is dismissed with costs, including the cost of two Counsel.

JUDGMENT

A Vorster AJ

Introduction

(1) The Federation of South African Fly Fisheries (FOSAF) applied to court for a declaration of invalidity of certain notices, published by the Minister, in which notice was given of her intention to list certain animals, plants or other organisms as invasive species and measures to control these species through

prohibitions, exemptions, and restrictions (AIS lists), and to make regulations relating to alien and invasive species (AIS regulations). The notices were published in terms of the **National Environmental Management: Biodiversity Act**, No. 10 of 2004 (**NEMBA**).

(2) The attack was based on the Minister's purported failure to comply, both in form and substance, with the public participation requirements set out in §§ 99 & 100 of **NEMBA**. I agreed with FOSAF that the Minister failed to comply with the peremptory requirements of the Act since the notices did not contain information which could enable the public to submit meaningful objections or representations on the proposed amendments, and the public was not informed that interested persons or communities could present the Minister, or a person designated by the Minister with oral representations or objections.

(3) Because of the failure I declared the notices invalid and of no force or effect. Neutral citation: **Federation of South African Fly Fisheries v Minister of Environmental Affairs** (62486/2018) [2021] ZAGPPHC 575 (10 September 2021).

(4) On 30 September 2021 the Minister delivered a notice of application for leave to appeal. The notice only came to my attention on 8 February 2022 when a

notice of enrollment was uploaded onto CaseLines, and I received an electronic notification to that effect. I managed to arrange with the Judge President to hear the matter on 7 March 2022.

Issues for determination

(5) Applications for leave to appeal are governed by rule 49(1) of the **Uniform Rules of Court** and §§ 16 & 17 of the **Superior Courts Act,** No. 10 of 2013.

(6) In terms of rule 49(1)(b) 'when leave to appeal is required and it had not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against'.

(7) In terms of §16(1)(a)(i) of the Act, an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6). Section 17(6)(a) of the Act provides:

'If leave is granted under subsection (2) (a) or (b) to appeal against a decision

of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal."

(8) Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including whether there are conflicting judgments on the matter under consideration.

(9) Considering the statutory and regulatory matrix, three questions for consideration arise in the application for leave to appeal. These questions are

not distinct but interrelated. The first question is whether the applicant filed a proper notice of application for leave to appeal which concisely and succinctly set out the grounds upon which leave to appeal is sought. The second question is whether the appeal would have a reasonable prospect of success or whether there are compelling reasons which exist why the appeal should be heard such as the interests of justice. The third question is whether the application for leave to appeal sets out expressly why the default position of an appeal to a full court of the Division should not prevail, as well as the questions of law or fact or other considerations involved which dictate that the matter should be decided by the Supreme Court of Appeal.

Did the applicant file a proper notice of application for leave to appeal

(10) The notice of application for leave to appeal must set out the grounds upon which leave to appeal is sought. The rules do not define 'grounds', but authorities seem to agree that it should be an error of law or facts alleged by the applicant as the defect in the judgment appealed against upon which reliance is placed to set it aside. See - **Xayimpi & others v Chairman, Judge White Commission (formerly known as Browde Commission) & others** [2006] JOL 16596 (E).

(11) An appeal may also lie against the exercise of judicial discretion. See – **Knox D'Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (A) [also reported at [1996] 3 All SA 669 (A)].

(12) The first enquiry is accordingly whether the notice clearly and succinctly set out in clear and unambiguous terms the incorrect findings of law or fact, or the basis upon which it is contended that the court did not act judicially. For an illuminating discussion on the distinction between findings of law, findings of fact, and judicial discretion. See - **Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited** [1992] 2 All SA 453 (A) at pages 457 – 459.

(13) Incorrect findings of fact cannot arise outside the record of proceedings because, save in exceptional circumstances, an appeal court will not permit disputes of fact or expert opinion to be raised for the first time on appeal. See - **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) at 388F-389A. An applicant must show that from the text of the decision appealed against (ipsissima verba), an accepted fact differs from a common cause or undisputed fact in the record of proceedings, or the judicial officer overlooked certain facts and /

or probabilities. See – **Rex v Dhlumayo and Another** [1948] 2 All SA 566 (A) at 594 par 10.

(14) The **Constitution**, legislation, the common law, and customary law are the laws of the Republic. There is a clear hierarchy of laws, with the **Constitution** being the supreme law of the Republic. See – Section 2 of the **Constitution**. Common law and customary law are subject to any legislation, consistent with the **Constitution**, that specifically deals with it. See - **Alexkor Ltd and Another v Richtersveld Community and Others** (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) at par 51.

(15) An applicant who relies on an incorrect finding of law must clearly and succinctly identify the incorrect legal principle applied by the court, and the correct legal principle that should have been applied.

(16) In the context of a judgment, legal issues and factual issues can never truly be separated and the question of fact must first be answered before the court will know which legal question must be dealt with. To determine whether the court acted judicially, a determination needs to be made with reference to all the relevant facts and principles. If an application is based on the contention

that the Court failed to act judicially, the notice should clearly and succinctly set out all the relevant facts and legal principles which the applicant relies upon, and the decision which in the result should reasonably have been made by the Court properly directing itself.

(17) This is however not the end of the enquiry. An appeal can only be noted against the judgment itself (i.e., the substantive order), not the reasons for the judgment, or the way the Court arrived at the judgment. See - **Cape Empowerment Trust Ltd v Fisher Hoffman Sithole** 2013 (5) SA 183 (SCA) at 198I–J. Even if an applicant succeeds in convincing the Court that it erred in fact and / or in law, or that it failed to act judicially, it must also show that the judgment (substantive order) would have been different if the Court applied the correct law or facts. The notice should therefore clearly specify what orders will be sought on appeal.

(18) The Minister advanced six grounds in support of the application for leave to appeal[1]:

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1 In argument Counsel for the Minister relied on a further ground, namely that the Court erred in failing to find that the application by FOSAF was premature. This

(18.1) the Court erred in finding that the matter had not become moot;

(18.2) the Court erred in finding that FOSAF had the power to sue in the public interest;

(18.3) the Court erred in finding that the declaratory relief sought and granted was competent;

(18.4) the Court erred in declaring the notices invalid and of no force and effect on the basis that the Minister failed to comply with the peremptory public participation requirements of the Act;

(18.5) the Court erred in failing to address §47A of **NEMA**;

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ground is not listed in the notice of application for leave to appeal and there can accordingly be no reliance on it. See - **Fischer and another v Ramahlele and others** [2014] JOL 31931 (SCA) at par 13.

(18.6) the Court erred in ordering the Minister to pay the cost of the application.

(19) The notice merely lists the purported errors by the Court and in one instance (the point raised by the Minister relating to standing) what the Minister contends should have been the correct finding. In criticizing the Court's findings, the Minister woefully failed to identify the facts clearly and succinctly (with reference to the record) and legal principles (with reference to the laws of the Republic) underpinning these contentions. This means that the grounds are so widely expressed that if leave is granted it will be left open to the Minister to canvass almost every finding of fact and ruling of law made by the Court.

(20) The peremptory requirement that an application for leave to appeal must set out the grounds upon which leave is sought is not met when incorrect findings are merely listed. Since an appeal will not lie against the reasons for the Court's judgment but against the substantive order, whether a Court of Appeal will agree with my reasoning would be of no consequence if it cannot be shown that the result would have been different. See - **Atholl Developments (Pty) Limited v Valuation Appeal Board for the City of Johannesburg** [2015] JOL 33081 (SCA) at paras 10 – 11.

(21) What compounds the criticism of the notice, is that it does not specify whether the grounds are based on incorrect findings of fact or law, or whether the attack is against the Court's failure to act judicially. Even if the grounds can be deduced from the notice, the defect is not cured because it is not for the Court or FOSAF to have to analyze the notice to establish what grounds the applicant intended to rely upon but failed to clearly set out. See - **Songono v Minister of Law & Order** 1996 (4) SA 384 (E) at 385.

(22) As the grounds are directed at my findings (reasons) as opposed to the substantive order, and the grounds are not clearly and succinctly set out in the notice, there is no proper application for leave to appeal before me and on this basis alone the application should be dismissed.

(23) However, the merits of the application were fully argued before me, so notwithstanding my views on the notice of application for leave to appeal I will nonetheless proceed to deal with the other issues for determination which I've identified earlier in the judgment.

Reasonable prospects of success or compelling reasons why the appeal should be heard

(24) In considering the application for leave to appeal I am guided by the criteria laid down in **Ramakatsa v African National Congress** [2021] JOL 49993 (SCA) at par 10.

'[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established,

leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'

(25) As I've already indicated, the notice of application for leave to appeal does not specify whether the Court erred in fact, or in law, or failed to exercise a discretion judicially. The heads of argument delivered on behalf of the Minister does very little to improve the situation. It does not, save in relation to §47A on **NEMA**, identify a singular factual finding in my judgment which conflicts with an established or common cause fact as evidenced by the affidavits which served the function of both pleadings and evidence. It also does not, save in relation to standing, identify an established legal principle which conflicts with the legal principles I applied to the facts of this case.

(26) As far as the issues of mootness, the granting of declaratory orders, and costs are concerned, the only avenue open to the Minister will be to convince an appeal court that I failed to exercise my discretion judicially in applying the law to the facts. To determine whether the Minister will have reasonable prospects of success on appeal on this basis, one needs to decipher the standard of interference that an appellate court will be justified in applying.

(27) The standard of interference and the test was authoritatively discussed in the well-articulated judgment of Khampepe J in the matter of **Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another** (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at par 88 - 89.

"[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised:

'. . . judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

[89] *In Florence, Moseneke DCJ stated:*

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'"

(28) It cannot be argued with any conviction that I did not have a discretion in relation to the issues of mootness, the granting of declaratory orders, and costs. I am not convinced that the way I exercised my discretion was at odds with the law. It is arguable that another court would have favored a different

option but unfortunately for the Minister that is not the test. I am not convinced that the Minister has reasonable prospects of success on appeal.

(29) I need to highlight an issue which had and continues to have a significant bearing on the way I exercised my discretion. In 2015 a full court of the Gauteng Division of the High Court was faced with an almost identical challenge to the one mustered by FOSAF. See - **Kruger and Another v Minister of Water and Environmental Affairs and Others** (57221/12) [2015] ZAGPPHC 1018; [2016] 1 All SA 565 (GP) (28 November 2015). The challenge was successful and almost identical notices published by the Minister were declared by the full court to be invalid and of no force or effect. Disaffected with the judgment of the High Court, the Minister applied for leave to appeal to the Supreme Court of Appeal without success. An application for leave to appeal to the Constitutional Court was dismissed, ostensibly on the basis that the application lacked prospects of success.

(30) What is disconcerting is that the Minister knew, or should at least have been advised, that her conduct bordered on contempt of the full court's judgment in the **Kruger** matter. It is inconceivable why the Minister would act in a manner which was previously reprobated by the full court. Although the **Kruger** matter did not embed a legal principle which should be regarded as authoritative, the Minister should have appreciated that the singularity of facts

was persuasive, and to ignore the import of that judgment violated the dignity, repute, and authority of the court. See: **Gcaba v Minister for Safety and Security and Others** 2010 (1) BCLR 35 (CC) at pars 58 – 62.

(31) So apart from dealing with the dispute between the Minister and FOSAF, my judgment also serves the purpose of vindicating judicial authority as well as having a coercive effect.

(32) I've dealt with the issue of standing in my judgment. The Minister's complaint was essentially that FOSAF could only act in its own interest and not in the interest of the broader public since its constitution does not allow for it to litigate in that capacity. In this regard the Minister relied on the ultra vires doctrine adopted from English law which provides that the legal capacity of a body corporate is determined by its main object as set out in the objects clause of its founding document. I found that the doctrine had become obsolete. The Minister contends that I erred in law because our courts still recognize the doctrine as valid.

(33) Section 38 of the **Constitution** and § 32 of **NEMA** provides for a constitutional and statutory interest to litigate in the public interest and in the interest of the environment. The common law must be applied consistent with **NEMA** and

the **Constitution**. Even if I was wrong in my reasoning that the ultra vires doctrine had become obsolete, the approach I adopted to FOSAF's standing to litigate in the public interest is consonant with constitutional and statutory interest. An appeal court might agree with the Minister that the doctrine is not obsolete, but such a finding will not affect the substantive part of the judgment which dealt with a set of facts posited within the context of the enforcement of fundamental rights. See – **Nampak Glass v Vodacom** 2019 (1) SA 257 (GJ) at pars 9 - 13.

(34) The Minister correctly contends that I did not deal with the application of § 47A of **NEMA**. The reason for doing so is patently obvious. Persuaded by the full court judgment in **Kruger**, I accepted that the defects in the notices were not merely procedural but substantive, having regard to the materiality of non-compliance with legal requirements. In the application for leave to appeal, the Minister gives no indication what the factual circumstances are which should have persuaded me that the non-compliance wasn't material. I relied on the content of the notices themselves to sustain the finding that non-compliance was substantial. I am not convinced that an appeal court would interfere with the substance of my judgment based on my failure to deal expressly with § 47A of **NEMBA**.

(35) In my view, the Minister does not have reasonable prospects of success on appeal. I am further of the view that there are no other compelling reasons why leave to appeal should be granted. Save for the preliminary points, the questions of law, which the Court were bound to answer, were authoritatively answered in the **Kruger** matter, and there are no conflicting judgments on these questions of law. See - **Patmar Explorations (Pty) Limited and others v Limpopo Development Tribunal and others** [2018] JOL 39695 (SCA) at par 8.

(36) The matter raised an important question about constitutional rights and duties. What the judgment did was to affirm these constitutional rights and duties in line with the approach of the full court in the **Kruger** matter.

Conclusion

(37) Considering my finding that the Minister does not have reasonable prospects of success on appeal and that there are no compelling reasons why leave to appeal should be granted, I do not propose to deal with the question as to whether leave should be to a full court or the Supreme Court of Appeal.

(38) On a conspectus of all the issues raised, I dismiss the application for leave to appeal with costs, which costs is to include the cost of two Counsel.

A. VORSTER AJ

Acting Judge of the High Court

Date of hearing:	**7 March 2022**
Date of judgment:	**19 September 2022**
Counsel for the applicant:	**Adv. A. E. Franklin SC**
	Adv. J.E. Joyner
Instructed by:	**Bartletts Incorporated**
Counsel for the respondent:	**Adv. Geoff Budlender SC**
	Adv. Karisha Pillay SC
Instructed by:	**The State Attorney**